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No. 74-1431

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARTHUR COLEMAN MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a search warrant was executed improperly in violation of 18 U.S.C. 3109.[1]

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed without opinion (Pet. App. K), and denied a petition for rehearing on March 4, 1975 (Pet. App. M). The petition for a writ of certiorari was not filed until May 14, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

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[1]18 U.S.C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

1. The evidence at trial[2] showed that on July 20, 1973, Dale Moorman told Daniel H. Weiderman, a Special Agent with the Drug Enforcement Administration (DEA), that petitioner was storing marijuana at a storage facility owned by Moorman's parents. Moorman had seen the marijuana there and had provided the Houston Police Department with a sample of the marijuana which was analyzed by the Department. (Tr. 19-21, 36-38). Agent Weiderman established a surveillance of the storage stall rented by petitioner, and on July 25, 1973, he observed petitioner at the stall (Tr. 40-41).[3]

The following day, July 26, Agent Weiderman approached the stall, observed two marijuana seeds by the door, and smelled the aroma of marijuana (Tr. 39). Thereupon, he obtained a search warrant from the magistrate and returned to the stall (Tr. 42-44). After waiting four or five hours for petitioner to appear at the stall, Agent Weiderman and other DEA agents decided to execute the warrant; they broke a padlock on the stall's door, entered and seized approximately 55 kilograms of marijuana (Tr. 44-46, 56). The next day a warrant was obtained for petitioner's arrest, and he was arrested at his home, approximately seven or eight miles from the stall (Tr. 49, 57-58).

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[2]A waiver of jury trial was filed, the case was tried before the court and, pursuant to the court's order, the motion to suppress evidence was "carried with the case and decided at the trial" (C.A. App. 5; Tr. 3).

[3]The storage stall rented to petitioner by Moorman's parents was a cinder block structure approximately ten feet by ten feet (Tr. 8, 53-54). It was one of 183 storage stalls owned by Moorman's parents and operated as Moorman's Self-Storage Warehouses (Tr. 5-6, 10-11).

2. Conceding the validity of the search warrant (Pet. 5) and acknowledging that there is no case law to support his position (Pet. 12), petitioner contends that the execution of the search warrant was improper because petitioner was not present at the time of its execution. He claims that 18 U.S.C. 3109 was violated when the agents obtained entry to the stall by breaking the padlock in petitioner's absence.

18 U.S.C. 3109 permits an officer to break into a residence and execute a search warrant after he gives notice of his authority and purpose and after he is refused admittance. However, this statute is applicable only to "a house, or any part of a house." It cannot be invoked by petitioner to challenge the forcible entry into a ten-foot square rented storage stall which was operated as part of a commercial enterprise. See note 3, *supra*.[4]

Moreover, neither 18 U.S.C. 3109 nor the Fourth Amendment requires that the occupant be present before a search pursuant to a valid search warrant may be conducted. *United States* v. *Gervato*, 474 F.2d 40 (C.A. 3), certiorari denied, 414 U.S. 864. Nor does Rule 41, Fed. R. Crim. P., provide, among its mandatory requirements, that a search warrant be executed only in the presence of the occupant. To the contrary, it provides that an inventory shall be made "in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, *if they are present* * * *." Rule 41(d), Fed. R. Crim. P. (emphasis supplied). See *United States* v. *Gervato, supra*, 474 F.2d at 43-44.

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[4]All of the cases upon which petitioner relies, save one, involved searches of either hotel rooms or apartments. See *Jack* v. *United States*, 387 F.2d 471, 473 (C.A. 9), certiorari denied, 392 U.S. 934; *Munoz* v. *United States*, 325 F.2d 23, 26 (C.A. 9); *United States* v. *Watson*, 307 F. Supp. 173, 174 (D. D.C.); *United States* v. *Sims*, 231 F. Supp. 251, 253 (D. Md.). While *United States* v. *Mullin*, 329 F.2d 295 (C.A. 4), involved a smokehouse, the smokehouse was located on a farm, only 75 feet from the defendant's residence, and constituted an "integral part of a group of structures making up the * * * home" (329 F.2d at 298). Thus, the *Mullin* case, too, is inapposite.

In sum, the breaking of the padlock to gain entry to petitioner's rented stall was reasonable in the circumstances and did not violate 18 U.S.C. 3109 or the Fourth Amendment merely because petitioner was not present.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.